

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,
Plaintiff,

v.

GMS MANAGEMENT-TUCKER, INC.,
TUCKER HOUSE II, INC.
Defendants.

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CIVIL ACTION NO. 96-1271

COMPLAINT

INTRODUCTION

The United States Attorney for the Eastern District of Pennsylvania brings this civil action under the False Claims Act, 31 U.S.C. § 3729, et seq., and alleges that GMS Management-Tucker, Inc., and Tucker House II, Inc., schemed to bill and collect from the United States of America for services associated with the care rendered to the elderly residents of Tucker House Nursing Home when, in fact, that care was not adequate.

Congress, in the Omnibus Budget Reconciliation Act of 1987 ("OBRA '87"), enacted the Nursing Home Reform Act, 42 U.S.C.A. §1396r et seq., (hereinafter "the Act") which took effect on October 1, 1990. A nursing facility is defined in the Act as "an institution...which--

(1) is primarily engaged in providing to residents--

(A) skilled nursing care and related services for residents who require medical or nursing care,

- (B) rehabilitation services for the rehabilitation of injured, disabled, or sick persons, or
- (C) on a regular basis, health-related care and services to individuals who because of their mental or physical condition require care and services (above the level of room and board) which can be made available to them only through institutional facilities, and is not primarily for the care and treatment of mental diseases;

42 U.S.C.A. § 1396r(a).

The Act mandates that nursing facilities comply with federal requirements relating to the provision of services. 42 U.S.C.A. § 1396r(b). Specifically, in terms of the quality of life for residents of nursing facilities, the Act states that: "A nursing facility must care for its residents in such a manner and in such an environment as will promote maintenance or enhancement of the quality of life of each resident." 42 U.S.C.A. § 1396r(b)(1)(A).

Additionally, the Act mandates that a nursing facility "provide services and activities to attain or maintain the highest practicable physical, mental and psychosocial well-being of each resident in accordance with a written plan of care which-

- (A) describes the medical, nursing, and psychosocial needs of the resident and how such needs will be met;..."

42 U.S.C.A. § 1396r(b)(2)(A).

A duty is placed on the nursing facility to fulfill the residents' care plans by providing, or arranging for the provision of, inter alia, nursing and related services and medically-related social services that attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, pharmaceutical services and dietary services

that assure that the meals meet the daily nutritional and special dietary needs of each resident. 42 U.S.C.A. § 1396r(4)(A)(i-iv).

The Social Security Act mandates that skilled nursing facilities that participate in the Medicare Program and nursing facilities that participate in the Medical Assistance Program, also known as Medicaid, meet certain specific requirements in order to qualify for such participation. These requirements are set forth at 42 CFR § 483.1 et seq. and "serve as the basis for survey activities for the purpose of determining whether a facility meets the requirements for participation in Medicare and Medicaid." 42 CFR § 483.1.

Federal regulations, when addressing quality of care concerns, mandate that "[e]ach resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care." 42 CFR § 483.25. The regulations specifically address the area of nutrition:

(i) Nutrition. Based on a resident's comprehensive assessment, the facility must ensure that a resident--

(1) Maintains acceptable parameters of nutritional status, such as body weight and protein levels, unless the resident's clinical condition demonstrates that this is not possible; and

(2) Receives a therapeutic diet when there is a nutritional problem. 42 CFR § 483.25(i).

Additionally, the Federal regulations specifically address those individuals who are tube-fed:

(g) Naso-gastric tubes. . Based on the comprehensive assessment of a resident, the facility must ensure that--

(1) A resident who has been able to eat enough alone or with assistance is not fed by naso-gastric tube unless the resident's clinical condition demonstrates that use of a naso-gastric tube was unavoidable; and

(2) A resident who is fed by a naso-gastric or gastrostomy tube receives the appropriate treatment and services to prevent aspiration pneumonia, diarrhea, vomiting, dehydration, metabolic abnormalities, and nasal-pharyngeal ulcers and to restore, if possible, normal eating skills. 42 CFR § 483.25(g).

Tucker House Nursing Home is a licensed long-term care (nursing) facility under federal and state law and is certified to participate in the Medicare and Medical Assistance Programs. The Medicare Program is a health insurance program for individuals 65 years and older, certain disabled individuals under age 65 and people of any age who have permanent kidney failure. The Medicare statute is codified at 42 U.S.C.A. § 1395 (Title XVIII of the Social Security Act).

The Medical Assistance Program is a joint federal-state program funded under Title XIX of the Social Security Act. The Department of Public Welfare administers the Medical Assistance

Program in Pennsylvania. As a prerequisite to enrollment as a provider in the Medical Assistance Program, Tucker House entered into a provider agreement and agreed to the following provisions:

1. That the submission by, or on behalf of, the Facility of any claim, either by hard copy or electronic means, shall be certification that the services or items from which payment is claimed actually were provided to the person identified as a medical assistance resident by the person or entity identified as the Facility on the dates indicated.

5. That the Facility's participation in the Medical Assistance Program is subject to the laws and regulations effective as to the period of participation, including all of those that may be effective after the date of the agreement and that the Facility has the responsibility to know the law with respect to participation in the Medical Assistance Program.

At all times relevant to this action, Tucker House was a "provider" with a valid provider agreement with the Pennsylvania Department of Public Welfare.

The Nursing Home Reform Act also mandates that the State shall be responsible for certifying, in accordance with surveys conducted by the state, the compliance of nursing facilities (other than facilities of the State)... The Secretary [Department of Health and Human Services] shall be responsible for

certifying..., the compliance of State nursing facilities with the requirements of such subsections. 42 U.S.C.A. § 1396r(g)(1)(A).

The Pennsylvania Department of Health is responsible for performing the survey function of long-term care facilities in Pennsylvania. By state regulation, facilities are required to meet the daily nutritional needs of patients. 28 Pa. Code § 211.6(a). Additionally, if consultant dietary services are used, the consultant's visits must be at appropriate times and of sufficient duration and frequency to provide continuing liaison with medical and nursing staff and provide advice to the administrator and participate in the development and revision of dietary policies and procedures. 28 Pa. Code § 211.6(m).

Long-term care facilities are also required to provide nursing services that meet the needs of residents. 28 Pa. Code § 211.12(a). It is incumbent upon the director of nursing services to assure that "preventive measures, treatments, medications, diet and other health services prescribed are properly carried out..." 28 Pa. Code § 211.12(e)(9).

Moreover, a nursing facility is required to retain a medical director who is responsible for the "coordination of the medical care in the facility to ensure the adequacy and appropriateness of the medical services provided to patients." 28 Pa. Code § 211.2(k).

Finally, a nursing home administrator is charged with the general administration of the facility whether or not his or her

functions are shared with one or more other individuals. 63 P.S. § 1102(2). According to regulations promulgated by the Nursing Home Administrators Board, a nursing home administrator is responsible for: (a) evaluating the quality of resident care and efficiency of services, (b) maintaining compliance with governmental regulations, and (c) developing policies which govern the continuing care and related medical and other services provided by the facility which reflect the facility's philosophy to provide a high level of resident care in a healthy, safe and comfortable environment. 49 Pa. Code §§ 39.91(1)(i), (ii), (vi).

In March 1994, Tucker House was surveyed by Pennsylvania Department of Health surveyors. The surveyors ordered Tucker House personnel to immediately arrange for the transfer of several residents from Tucker House to local hospitals for treatment. Ultimately, new management was installed at Tucker House Nursing Home.

The Government's complaint charges that the defendants caused the submission of false or fraudulent claims to the United States for payment for care that was not adequately rendered to some of the most vulnerable members of our society; the frail, immobile elderly residing at Tucker House Nursing Home.

FACTUAL BASIS FOR COMPLAINT

RESIDENT 1

Resident 1 entered Tucker House Nursing Home in 1989. He weighed 125 pounds and had a serum albumin of 3.1 at the time of admission. The normal range for serum albumin is between 3.5 and 4.5. Resident 1's height was between 5' 9" and 5' 11" and his ideal body weight was between 148 and 158 pounds. From November 1991 through August 1993, his weight decreased. In August 1993, Resident 1 weighed 105 pounds and in October 1993, he weighed 104 pounds. By January 1994, Resident 1's serum albumin was 1.8, which indicates profound protein malnourishment. While at Tucker House Nursing Home, Resident 1 was not provided with adequate nutrition and was so malnourished by October 1993, there was no way that his body could heal itself or respond to injury in a successful manner. Resident 1 was hospitalized in March of 1994 and was suffering from multiple Stage IV decubitus ulcers.

RESIDENT 2

Resident 2 entered Tucker House Nursing Home in 1987 weighing 168 pounds which was 20% over his ideal body weight. As of February 1990, he weighed 141 pounds which was approximately his ideal body weight. By August 1992, Resident 2 weighed 116 pounds which was approximately 83% of his ideal body weight. In February 1993, Resident 2 began to develop decubitus ulcers that did not heal. By October 1993, he weighed 98 pounds and his serum albumin level was 2.6 indicating severe protein malnourishment. In October 1993, Resident 2 was found to be

malnourished by physician consultants at Tucker House Nursing Home which led to him being hospitalized, yet the proper amount of nutritional alimentation was not provided until March 1994.

RESIDENT 3

Resident 3 was admitted to Tucker House Nursing Home in November 1989. In 1993, she began to lose weight and her skin began to break down. A weight loss of 19.2 pounds was noted in December 1993 and Resident 3, at that point in time, weighed 98.2 pounds. Her ideal body weight was 110 pounds. Three days later she was weighed at 92.7 pounds with a notation in the nursing home's records that her appetite was good. By February 1994, Resident 3's albumin was 2.2 which evidenced the fact that she was profoundly malnourished. As of March 15, 1994, Resident 3 weighed 85 pounds.

Additionally, Resident 3 was ambulatory upon admission and her medical records do not evidence an unavoidable decline in ambulation. As evidenced in her nursing home records, she was frequently in a wheelchair, often in restraints. This positioning does not allow for adequate pressure relief for the sacral and gluteal areas. The decubitus ulcers that were noted that occurred prior to January 1994 were related to inadequate pressure relief.

Jurisdiction and Venue

1. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1345 and 31 U.S.C. § 3729 et seq.

2. Venue is proper in the Eastern District of Pennsylvania under 28 U.S.C. §§ 1391 (b) and (c).

Parties

3. Plaintiff is the United States of America acting for itself, the Department of Health and Human Services, the Medicare Trust Fund, the Medical Assistance Program and the beneficiaries thereof.

4. Defendant, GMS Management-Tucker, Inc., is a for-profit Pennsylvania corporation located at 5601 Chestnut Street, Philadelphia, Pa. 19139.

5. Defendant, Tucker House II, Inc., is a non-profit Pennsylvania corporation which owns Tucker House Nursing Home, a licensed and certified long-term care facility located at 1001-1011 Wallace Street, Philadelphia, Pa. 19123.

COUNT I

FALSE CLAIMS ACT: 31 U.S.C. § 3729

6. The above paragraphs are realleged as though fully set forth herein.

7. Defendant, Tucker House II, Inc. is the owner and licensee of Tucker House Nursing Home and is responsible for ensuring that all state and federal laws, regulations and requirements were complied with at all times.

8. Defendant, Tucker House II, Inc. entered into a management contract with defendant GMS Management-Tucker, Inc. and Total Care Management Services, Inc. for the operation of Tucker House Nursing Home.

9. Defendant, GMS Management-Tucker, Inc. required that Tucker House Nursing Home personnel utilize the nursing and nutritional services provided by GMS Management-Tucker, Inc. in caring for residents of Tucker House.

10. Defendant, GMS Management-Tucker, Inc. was responsible for the nutritional evaluation of residents of Tucker House Nursing Home. In accordance with state and federal regulations, the nutritionists, in conjunction with the attending physicians, were also responsible for ensuring that residents received adequate nutrition.

11. Defendant, GMS Management-Tucker, Inc. failed to recommend adequate nutritional requirements for Residents 1, 2, and 3 yet claims for such care were submitted to and reimbursed by the government.

12. The provision of adequate nutrition was the responsibility of not only the nutritionists but included the Tucker House nursing staff as well. The nursing staff at Tucker House was supervised by the Director of Nursing. The Director of Nursing was apprised of all Tucker House Nursing Home residents that were losing weight.

13. The Director of Nursing at Tucker House Nursing Home was employed by defendant, GMS Management-Tucker, Inc.

14. The Nursing Home Administrator was responsible for the overall care provided to residents at Tucker House Nursing Home. The Administrator at Tucker House Nursing Home was an employee of GMS Management-Tucker, Inc.

15. The care provided to Residents 1, 2, 3 that is the subject of this lawsuit was inadequate in terms of nursing care and nutrition, both of which were the responsibility of the Nursing Home Administrator.

16. Agents and/or employees of defendant, GMS Management-Tucker, Inc. were responsible for the provision of nursing and nutritional services to Residents 1, 2 and 3.

17. The billing information applicable to the care provided to Residents 1, 2 and 3 was transmitted from Tucker House staff to agents and/or employees of defendant GMS Management-Tucker, Inc. for submission to the government for reimbursement by the Medicare and Medical Assistance Programs.

18. Agents and/or employees of defendant, GMS Management-Tucker, Inc. submitted false, fictitious or fraudulent claims to the Pennsylvania Department of Public Welfare, Medical Assistance Program for nutritional services that were not adequately rendered to Residents 1, 2, and 3 for the time period January 1993 through March 1994, by certifying that the information contained on the invoices, diskettes or tapes was accurate and complete with the full understanding that payment and satisfaction of the claims was from Federal and State funds and that prosecution for false claims, statements or documents,

or concealment of material facts was a part of the certification.
31 U.S.C.A. § 3729.

19. Defendants, Tucker House II, Inc. and GMS Management-Tucker, Inc., caused the repeated submission of false, fictitious or fraudulent claims to the Pennsylvania Department of Public Welfare, Medical Assistance Program, and to the Medicare Program for nutritional services that were not adequately rendered to Residents 1, 2, and 3 for the time period January 1993 through March 1994. 31 U.S.C. § 3729.

20. All named defendants knowingly and willfully did not ascertain the truth or falsity of the claims for services submitted to the Pennsylvania Department of Public Welfare and to the Medicare Program for payment on behalf of Residents 1, 2 and 3, all of whom were Medical Assistance recipients and Medicare beneficiaries. 31 U.S.C. § 3729.

21. All named defendants acted in reckless disregard of the care and services ordered and actually provided to Residents 1, 2 and 3 while residing at Tucker House when billing the Medicare and Medical Assistance Programs. 31 U.S.C. § 3729.

22. The United States was damaged as a result of the conduct described above.

WHEREFORE, plaintiff United States of America demands and prays that judgment be entered in its favor and against the defendants, Tucker House II, Inc. and GMS Management-Tucker, Inc., jointly and severally as follows:

- a. an amount equal to the number of false or fraudulent claims that will be proven at trial, multiplied as provided for in 31 U.S.C. § 3729 (a) and imposition of \$10,000.00 per claim;
- b. three times that total amount of damages sustained by the United States because of the acts complained of;
- c. costs of this action;
- d. such other and further relief as the Court shall deem proper.

COUNT II: UNJUST ENRICHMENT

23. The foregoing paragraphs are incorporated herein by reference as if fully set forth.

24. The conduct described in the foregoing paragraphs caused defendants Tucker House II, Inc. and GMS Management-Tucker, Inc. to receive, directly or indirectly, benefits from the United States.

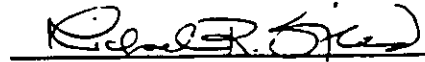
25. Under the circumstances described in the foregoing paragraphs, as between the United States and each defendant in this Count, retention by each defendant of the benefits conferred by the United States would be unjust.

WHEREFORE, plaintiff the United States of America demands judgment in its favor and against defendants, Tucker House II, Inc., and GMS Management-Tucker, Inc., jointly and severally, and relief as follows:

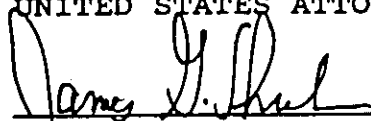
- a. an amount equal to the gain to the defendants as a result of the conspiracies and activities complained of;

b. interest according to law;
c. costs of this action; and
d. such other and further relief as this Court may
deem proper.

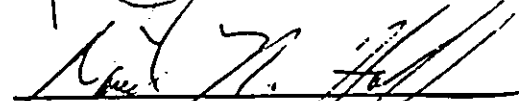
Respectfully submitted,



MICHAEL R. STILES
UNITED STATES ATTORNEY



JAMES G. SHEEHAN
ASSISTANT U.S. ATTORNEY
CHIEF CIVIL DIVISION



DAVID R. HOFFMAN
ASSISTANT U.S. ATTORNEY

Dated: 2/21/96